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No. 96-511

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JANET RENO,
Attorney General of the United States, *et al.*,
Appellants,
v.
AMERICAN CIVIL LIBERTIES UNION, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

RESPONSE OF APPELLEES AMERICAN LIBRARY ASSOCIATION, ET AL., TO APPELLANTS' JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the three-judge district court was correct in preliminarily enjoining provisions of the Communications Decency Act of 1996 (the "CDA") that criminalize the sending or displaying of "indecent" or "patently offensive" speech, on the grounds that those provisions violate the First Amendment to the U.S. Constitution because they effectively ban the communication of constitutionally protected speech among adults, do not directly and substantially further the government's stated interest, and are not narrowly tailored to serve that interest.

2. Whether the three-judge district court was correct in preliminarily enjoining the CDA on the grounds that the terms "indecent" and "patently offensive" "in context," which will be applied to millions of legally unsophisticated speakers engaged in an extraordinarily diverse range of communications in cyberspace, are so vague as to violate the First and Fifth Amendments to the U.S. Constitution.

PARTIES TO THE PROCEEDINGS

Appellants are Janet Reno, the Attorney General of the United States, and the United States Department of Justice. Appellees are the American Civil Liberties Union, Human Rights Watch, Electronic Privacy Information Center, Electronic Frontier Foundation, Journalism Education Association, Computer Professionals for Social Responsibility, National Writers Union, Clarinet Communications Corp., Institute for Global Communications, Stop Prisoner Rape, AIDS Education Global Information System, Bibliobytes, Queer Resources Directory, Critical Path AIDS Project, Inc., Wildcat Press, Inc., Declan McCullagh d/b/a Justice on Campus, Brock Meeks d/b/a Cyberwire Dispatch, John Troyer d/b/a The Safer Sex Page, Jonathan Wallace d/b/a The Ethical Spectacle, Planned Parenthood Federation of America, Inc., American Library Association, Inc., America Online, Inc., American Booksellers Association, Inc., American Booksellers Foundation for Free Expression, American Society of Newspaper Editors, Apple Computer, Inc., Association of American Publishers, Inc., Association of Publishers, Editors and Writers, Citizens Internet Empowerment Coalition, Commercial Internet Exchange Association, CompuServe Incorporated, Families Against Internet Censorship, Freedom to Read Foundation, Inc., Health Sciences Libraries Consortium, Hotwired, Inc., Interactive Digital Software Association, Interactive Services Association, Magazine Publishers of America, Microsoft Corporation, The Microsoft Network, L.L.C., National Press Photographers Association, Netcom On-line Communications Services, Inc., Newspaper Association of America, Opnet, Inc., Prodigy Services Corp., Society of Professional Journalists, and Wired Ventures, Inc.

Pursuant to this Court's Rule 29.6, appellees American Library Ass'n *et al.* list the following parent companies and nonwholly owned subsidiaries of the corporate parties among them: Digital Marketing Services, Inc., H & R Block, Inc., International Wireless, Inc., Prodigy, Inc., and SonicNet, Inc.

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RESPONSE OF APPELLEES AMERICAN LIBRARY ASSOCIATION, ET AL., TO APPELLANTS' JURISDICTIONAL STATEMENT

Pursuant to Rule 18.6 of the Rules of this Court, appellees American Library Association, *et al.*, respectfully submit this response to the government's jurisdictional statement.

INTRODUCTION

During much of this century, the mass media has been characterized by a limited number of speakers transmitting programming and information to essentially passive audiences. The communications medium of the twenty-first century—the Internet and cyberspace generally—is changing that, and will allow hundreds of millions of individuals to engage in interactive communication, on a national and global scale never before possible. The public square of the past—with pamphleteering, soap boxes,

and vigorous debate—is being replaced by the Internet, which enables average citizens to participate in national discourse, publish a newspaper, distribute an electronic pamphlet to the world, and generally to communicate to and with a broader audience than ever before possible. It also enables average citizens to gain access to a vast and literally world-wide range of information.

The Communictions Decency Act ("CDA" or the "Act")[1] represents Congress' first attempt to regulate speech content in this promising new medium. Unfortunately, Congress undertook this task without holding *any* hearings regarding the likely impact of the CDA on that medium. In the name of protecting children from inappropriate material they might encounter online, Congress clumsily attempted to graft regulations developed in the "dial-a-porn" context onto this very different, indeed unique, mode of communication.

After making precisely the kind of inquiry Congress failed to make—that is, undertaking five days of evidentiary hearings and considering massive amounts of documentary evidence, including extensive stipulated facts—the three-judge district court below preliminarily enjoined enforcement of provisions of the CDA that effectively ban "indecent" and "patently offensive" communications between adults. Appendix to Jurisdictional Statement ("J.S. App.") 148a-49a.[2] The district court unanimously held that appellees are likely to succeed in their claim that this ban violates the First Amendment.[3]

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[1] The CDA was enacted as Title V of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 56, 133-35, and will be codified at 47 U.S.C. §§ 223(a)-(h).

[2] Appellees did not challenge the application of the CDA to obscenity, child pornography, and unlawful child solicitation, and the court's order does not reach those applications. *See* J.S. App. 150a-51a.

[3] Subsequently, another three-judge district court, addressing a separate, and somewhat narrower challenge to the CDA, unanimously reached the same conclusion. *See Shea v. Reno*, 930 F. Supp. 916 (S.D.N.Y. 1996). The government has filed a jurisdictional statement in *Shea*, No. 96-595, urging this Court to hold *Shea* pending resolution of this case. Appellees agree that is the proper approach.

That judgment was clearly correct. Nevertheless, appellees appreciate that this case raises important constitutional questions regarding the application of traditional First Amendment principles to a new and increasingly important medium of communication, and therefore recognize that the Court is likely to grant plenary review regardless of the strength of the district court's decision. Although we believe the judgment below could be summarily affirmed, we understand that in this case of first impression, the Court may prefer to engage in a more comprehensive examination of this new medium, and of the extensive record compiled below. We agree that in the circumstances of this case, plenary review may be appropriate, even if, as we believe, the judgment below is plainly correct. Accordingly, we do not oppose the government's request for plenary review.[4]

However, we believe it is particularly important to this case of first impression that the Court have a clear understanding of precisely what was argued and decided below. For example, the government did *not* argue below, as it apparently does here, that Sections 223(a)(1)(B) and 223(d)(1)(A) of the CDA criminalize "indecent" or "patently offensive" speech only when the speaker *knows* that the *only* recipients of the speech are all under 18 years of age. Moreover, the government's jurisdictional statement frequently ignores dispositive findings of fact the government does not argue are erroneous. Accord-

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[4] We note that the government has *not* urged summary reversal. We note also that the plaintiffs/appellees ACLU *et al.* in the consolidated case *have* moved for summary affirmance. Obviously, appellees in this case would welcome that resolution, and our belief that the Court would probably prefer plenary review should not be understood as casting any doubt on the strength of that motion.

ingly, we submit this response in order to present a more complete picture of what was, and was not, decided below.

COUNTERSTATEMENT OF THE CASE

A. *Plaintiffs/Appellees in These Actions.*

Appellees in these two consolidated cases represent a broad and very diverse spectrum of content providers, service providers, and users of content on the Internet.[5] The appellee content providers include individuals, small non-profit organizations, libraries, book stores, and other speakers on the Internet. The appellee access providers include small or non-commercial "Internet service providers" ("ISPs") as well as the world's leading ISPs and commercial online services.

Collectively, appellees engage in or provide access to an enormous variety of speech on the Internet, *e.g.*, information about AIDS awareness, classical and modern literature, political commentary, and interactive discussions on an array of topics. All of this speech is appropriate and constitutionally protected for adults, and the vast majority of this speech is appropriate and constitutionally

[5] The plaintiffs/appellees in this case, *American Library Association, Inc., et al. v. United States Department of Justice, et al.*, are the American Library Association, Freedom to Read Foundation, America Online, Inc., Society of Professional Journalists, The Microsoft Network, L.L.C., Newspaper Association of America, Association of Publishers, Editors and Writers, Association of American Publishers, Inc., CompuServe Inc., Commercial Internet Exchange Association, Netcom Online Communications Services, Inc., Prodigy Services Corp., American Society of Newspaper Editors, Interactive Services Association, Microsoft Corp., American Booksellers Association, American Booksellers Foundation for Free Expression, Wired Ventures, Inc., OpNet Inc., Hotwired, Inc., The Health Sciences Libraries Consortium, Apple Computer, Inc., Citizens Internet Empowerment Coalitions, Families Against Internet Censorship, Interactive Digital Software Association, Magazine Publishers of America, and National Press Photographers Ass'n.

protected for most minors as well. Nevertheless, appellees engage in or provide access to some speech that, in some communities, could be considered "indecent" or "patently offensive." Such speech includes communications that contain the "seven dirty words" found patently offensive in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), information about sexual issues and problems, and images that depict sexually oriented subjects.

Among this diverse group of appellee content-providers, most do not charge money for the speech they make available over the Internet (some appellees provide and charge for *access* to the Internet or to an online service). Thus, users around the world generally can access appellees' speech on the Internet free of charge. Like other online speakers, appellees generally seek to make their speech available to the broadest possible audience, including listeners within and outside of the United States.

B. *The Three-Judge District Court's Decision.*

Appellants' statement of the case omits any reference to or discussion of the extensive and unusually detailed factual findings of the three-judge district court that formed the foundation for the decision on appeal. *See* J.S. App. 11a-61a. The Jurisdictional Statement fails to acknowledge the district court's critical factual findings that (1) it is impossible or infeasible for most Internet speakers to comply with the CDA's affirmative defenses; (2) because of the global nature of the Internet, the CDA will not effectively shield minors from indecent or patently offensive speech since a very substantial percentage of such speech is posted abroad, and will not be deterred by the CDA; and (3) parents can use currently available software and access provider options to control what Internet sites their children may access. These findings undergird the district court's legal conclusions that the Act effectively bans constitutionally protected speech among adults, would not substantially further the govern-

ment's stated interest in shielding minors from indecent online speech, and is not the least restrictive means available to serve the government's interest.

1. *Impossibility and infeasibility of compliance.* The district court received extensive evidence from numerous experts and other witnesses, and carefully considered the different methods of communication over the Internet. Based on this body of evidence, the court made its general factual finding that "[o]nce a provider posts content on the Internet, it is available to all other Internet users worldwide." J.S. App. 47a. For most methods of communication over the Internet, the court concluded that it simply *is not possible* for a speaker to restrict the availability of his or her speech to adults.

For example, the district court specifically considered the ability of a speaker posting a message to a USENET newsgroup to comply with the CDA. The court found that messages on newsgroups are "disseminated using ad hoc, peer to peer connections between approximately 200,000 computers (called USENET 'servers') around the world," J.S. App. 23a, and that the "dissemination of messages to USENET servers around the world is an automated process that does not require direct human intervention or review," *id.* at 23a-24a. Because of this structure, the court found as a fact that "once a user posts a message to a newsgroup . . . , that message becomes available to all subscribers to that newsgroup or bulletin board." *Id.* at 47a. As the court below found, content posted to newsgroups is "available not just in Philadelphia, but also in Provo and Prague." *Id.* at 48a. The court specifically further found that "individuals posting a message to a newsgroup . . . *cannot ensure that all readers are adults.*" *Id.* at 50a (emphasis added) (noting that even the government's expert agreed with that factual conclusion).

The district court reached the same conclusions about e-mail, mail exploders (also known as listservs), chat

rooms, and MUDs and MUSEs. The court found as a fact that there is "no effective way to determine the identity or age of a user who is accessing material through e-mail, mail exploders, newsgroups, or chat rooms." J.S. App. 49a. With regard to mail exploders, the district court specifically noted that even the government's expert witness "agreed that no current technology could give a speaker assurance that only adults were listed in a particular mail exploder's mailing list." *Id.* at 50a. As with newsgroups and mail exploders, the court based its finding that individuals "engaging in chat room discussions cannot ensure that all readers are adults" in part on the fact that the government's expert agreed. *Id.* Similarly, with MUDs and MUSEs, the court found as a fact that "participants . . . do not know whether the other participants are adults or minors." *Id.* at 51a.

With respect to the World Wide Web (which is one method of communication on the Internet), the court found that "[u]nlike other forms of communication on the Internet," J.S. App. 51a, there does exist "technology by which an operator of a World Wide Web server may interrogate a user of a Web site" using a computer program called a "cgi script," *id.* The court found as a fact, however, that content providers who publish on the World Wide Web via the large commercial online services cannot use cgi scripts. *Id.* For those speakers on the Web, there "is no method currently available . . . to screen recipients online for age." *Id.*

The court concluded that *all* of the "defenses" advanced by the government below "are effectively unavailable for non-commercial, not-for-profit entities," J.S. App. 61a, and these entities constitute the majority of speakers on the Internet. *See id.* at 43a-44a. For example, the district court found, as a fact, that "credit card verification is effectively unavailable to a substantial number of Internet content providers as a potential defense to the CDA." *Id.* at 54a. The district court similarly consid-

ered the "adult verification" defense and found as a fact that the "burdens imposed by credit card verification and adult password verification systems make them effectively unavailable to a substantial number of Internet content providers." *Id.* at 56a. Finally, the district court found as a fact that the government's "tagging" proposal would not allow a *speaker* to ensure that a listener is not a minor. *Id.* at 57a-58a.

Chief Judge Sloviter summarized the court's factual conclusions as follows:

> we have found that no technology exists which allows those posting [protected but indecent material] on the category of newsgroups, mail exploders or chat rooms to screen for age. Speakers using those forms of communication cannot control who receives the communication, and in most instances are not aware of the identity of the recipients. If it is not feasible for speakers who communicate via these forms of communication to conduct age screening, they would have to reduce the level of communication to that which is appropriate for children in order to be protected under the statute. This would effect a complete ban even for adults of some expression, albeit "indecent," to which they are constitutionally entitled . . . .
>
> Even as to content providers in the other broad category, such as the World Wide Web, where efforts at age verification are technically feasible through the use of Common Gateway Interface (cgi) scripts . . . , the Findings of Fact show that as a practical matter, non-commercial organizations and even many commercial organizations using the Web would find it prohibitively expensive and burdensome to engage in the methods of age verification proposed by the government, and that even if they could attempt to age verify, there is little assurance that they could successfully filter out minors.

J.S. App. 74a. In their Findings of Fact, the three judges below found as facts that:

> Many speakers who display arguably indecent content on the Internet must choose between silence and the risk of prosecution. *The CDA's defenses*—credit card verification, adult access codes, and adult personal identification numbers—*are effectively unavailable for non-commercial, not-for-profit entities.*

J.S. App. 61a (emphasis added).

2. *Ineffectiveness of the CDA.* The district court also made specific factual findings demonstrating that, because a substantial percentage of all of the indecent or patently offensive speech that is available on the Internet is posted abroad, the CDA *will not be effective* in its claimed goal of preventing children from accessing that material. The court found that a "large percentage, perhaps 40% or more," of content on the Internet "originates outside of the United States," J.S. App. 59a, and some of that foreign speech is sexually explicit, *id.* As the court found, "[f]oreign content is otherwise indistinguishable from domestic content (as long as it is in English), since foreign speech is created, named, and posted in the same manner as domestic speech." *Id.* Minors would have unfettered access to all indecent or patently offensive speech posted abroad, and thus, as Judge Dalzell concluded, "the CDA will almost certainly fail to accomplish the Government's interest in shielding children from pornography on the Internet." *Id.* at 145a.

3. *Availability of user software to block or screen material on the Internet.* Finally, the government's Jurisdictional Statement entirely omits any mention of the extensive factual findings of the district court concerning the variety of methods by which parents can easily and inexpensively prevent their children from accessing indecent or patently offensive online content *even* if posted overseas.[6] The court identified many different and cur-

[6] Thus, user based blocking is far *more* effective than the speaker based blocking required by the CDA, because only user based blocking will prevent minors from accessing the substantial percentage

rently available software programs that allow parents to limit the Internet access of their children. J.S. App. 35a-41a. Similarly, the court found that the major online services all offer extensive options to allow parents to control what their children can access. *Id.* at 41a-42a.

Given these factual findings, *which the government has not contested*, it is clear that the three-judge district court correctly held that plaintiffs/appellees had demonstrated a likelihood of success on their claim that the challenged provisions of the CDA violate the First Amendment.[7]

ARGUMENT

I. THE DISTRICT COURT'S PRELIMINARY INJUNCTION SHOULD BE AFFIRMED BECAUSE THE GOVERNMENT HAS NOT CONTESTED THE FACTS ON WHICH THAT INJUNCTION IS BASED, AND DOES NOT ASK THE COURT TO OVERRULE THE LONG-ESTABLISHED FIRST AMENDMENT PRINCIPLES ON WHICH THAT INJUNCTION IS BASED.

As noted, the government does not argue that the district court's findings of fact are arbitrary or otherwise erroneous. Nor does the government question the First

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of all indecent speech that is posted abroad. And unlike speaker based blocking, which effectively prohibits *adults* from gaining access to the blocked speech, user based blocking enables parents to gain access to the speech themselves, while denying access to their children.

[7] Two judges also concluded that the CDA is unconstitutionally vague. In particular, Judges Sloviter and Buckwalter agreed that the terms "indecent" and "patently offensive" "in context" are so vague as to violate the First and Fifth Amendments. J.S. App. 80a (Sloviter, J.); 84a-85a (Buckwalter, J.). These judges were clearly correct, notwithstanding this Court's distinguishable decision in *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 116 S.Ct. 2374 (1996); however, because the district court's decision can and should be affirmed on the basis of its First Amendment holding, there is no need for the Court to reach the vagueness issue.

Amendment principles invoked by the district court. Accordingly, the government is simply challenging the application of settled First Amendment principles to undisputed findings of fact.

A. The Government Does Not Question the District Court's Conclusion That the CDA Must Be Subjected to Strict Scrutiny.

The government does not dispute that the district court appropriately subjected the CDA's content-based restrictions to strict scrutiny. *See* Jurisdictional Statement ("J.S.") 15. Its sole argument is that the Act can be upheld under strict scrutiny because the Act "directly and materially" serves a "compelling" government interest in the "least restrictive" way. *Id.*, citing *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). *Accord Turner Broadcasting Sys. v. FCC*, 114 S.Ct. 2445, 2470 (1994).[8] The government relies, as it did below, on its interest in protecting children from "patently offensive" and "indecent" sexually oriented online material. *See* J.S. App. 65a (Sloviter, J.); 143a (Dalzell, J.).

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[8] The government wisely has not resurrected its argument, suggested but not seriously urged below, that an "intermediate scrutiny" standard, drawn from *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), might be appropriate instead. Clearly such a standard is not applicable here where there is no plausible analogy to the spectrum scarcity of broadcast: the Internet's characteristics are the antithesis of the scarcity that underlies the *Pacifica* standard. *See Turner*, 114 S.Ct. at 2457 (refusing to extend *Pacifica* standard to cable television); *Sable*, 492 U.S. at 127-28 (same regarding dial-a-porn services). Nor is the Internet characterized by the pervasiveness and intrusiveness the *Pacifica* Court found noteworthy about broadcast. As the district court found, accessing online content requires several affirmative steps; "[c]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden." J.S. App. 49a. Moreover, "[a]lmost all sexually explicit images are preceded by warnings as to the content." *Id.* Thus, as the government's witness admitted, "the 'odds are slim' that a user would come across a sexually explicit site by accident." *Id.*

But the government also invents a *new* interest, never advanced below—"furthering the First Amendment interests of all parents and children in using what has become an unparalleled tool for communicating and retrieving information." J.S. 16.[9] Without citation to the record, the government now asserts (as if it were a matter of fact) that unless "patently offensive" and "indecent" material is suppressed at the speaker end, "many parents will be deterred from permitting their children to use the Internet; indeed, many parents will be deterred from bringing the Internet into their homes at all." *Id.* The government introduced *no* evidence to support these assertions of fact. And, not surprisingly, the district court was not asked to, and did not, make any such findings.[10] Thus, *nothing* in the record supports the assertion that the Act directly and substantially furthers this newly coined interest.[11]

In any event, it makes little difference what interest the government now asserts in attempting to justify the Act's ban on protected speech. The district court correctly concluded that the Act cannot survive the strict scrutiny to which it must be subjected.

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[9] In the context of strict scrutiny, the Court should consider only the precise interests the government identified and urged below as the justification for the law; it should not credit new interests advanced only on appeal and as to which the court below had no opportunity to take evidence or pass upon. In any event, the government cites no legal support, and there is none, for the proposition that assisting parents or children to use the Internet is a "compelling" government interest.

[10] Indeed, as the government itself notes, J.S. 6-7, the evidence shows that the number of minors gaining access to the Internet is rapidly increasing. And to the extent parents *are* concerned about their children's access to inappropriate materials, the district court found that user based technological tools are available to assist them in imposing restrictions. J.S. App. 42a.

[11] *See* note 18, *infra*, and accompanying text.

B. The District Court Correctly Concluded That Appellees Had Established a Likelihood of Success on Their Claim That the Challenged CDA Provisions Are Facially Unconstitutional.

Although the government now attempts to separate out and defend individually the three substantive provisions of the CDA preliminarily enjoined by the district court, this is *not* how the case was argued and tried below. To the contrary, the government made *no* attempt to distinguish between the three provisions, essentially conceding the same First Amendment analysis applies to all three.[12] The entire focus of the case—from the perspective of not only the court, but the parties as well—was the feasibility of the CDA's defenses and the Act's patent overbreadth. To the extent any one provision received attention, it was the "display" provision, 47 U.S.C. § 223(d)(1)(B). That provision criminalizes the online display of patently offensive material "in a manner available" to minors. The vast majority of the speech criminalized by the CDA, perhaps 99% of the speech at issue in this litigation, is criminalized by that provision. That provision unquestionably violates the First Amendment, as both the three-judge court below and the *Shea* court unanimously held.[13]

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[12] Below, the government's only specific argument regarding 47 U.S.C. § 223(a) was relegated to a footnote: "The specific basis for plaintiffs' challenge to section 223(a) is unclear. In the absence of a specific showing as to how this provision is applicable and might be in violation of the Constitution, it should not be enjoined." Defendant's Opposition to Plaintiffs' Motion for a Temporary Restraining Order (Feb. 14, 1996) at 13 n.8. The government made no specific arguments below regarding 47 U.S.C. § 223(d)(1)(A), and otherwise referred to 47 U.S.C. §§ 223(a) and 223(d) together throughout its papers.

[13] The government tacitly acknowledges the weakness of its argument that Section 223(d)(1)(B) can survive strict scrutiny when it states that the constitutional issues posed by that provision are "more difficult" than those posed by Sections 223(a) and 223(d)(1)(A). J.S. 14.

1. *The Display Provision Imposes a Criminal Ban on Constitutionally Protected Speech Contrary to Well-settled First Amendment Precedent.*

As the government essentially concedes, the challenged provisions of the CDA are clearly unconstitutional *unless* the Act's defenses effectively enable online speakers to communicate indecent or patently offensive speech to adults. *See* J.S. 16-17. That is so because this Court has repeatedly held that government may not ban indecent speech between adults in order to advance its interest in protecting minors from that speech. To the contrary, "government may not 'reduce the adult population . . . to . . . only what is fit for children.'"[14] "The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox," and this is so "*regardless* of the strength of the government's interest" in protecting children. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 74-75 (1983) (emphasis added). Government may not constitutionally "quarantin[e] the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence . . . . Surely this is to burn the house to roast the pig." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). In *Sable*, the Court cited *Butler* to "reiterate" that point, and stressed that a federal statute is unconstitutional if it has the "*effect* of limiting the content of adult [communications] to that which is suitable for children . . . ." 492 U.S. at 131 (emphasis added).[15] *See also Denver Area*

[14] *Sable Communications v. FCC*, 492 U.S. at 128 (quoting from *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 73 (1983), which in turn quoted from *Butler v. Michigan*, 352 U.S. 380, 383 (1957)).

[15] Thus, this bedrock principle has already been applied in the context of sale or distribution of immoral books and other printed materials (*Butler*), use of the postal service to mail unsolicited commercial advertisements about contraceptives to homes (*Bolger*), and use of the telephone to sell sexually explicit communications (*Sable*).

Educ. Telecomm. Consortium v. FCC, 116 S.Ct. 2374, 2393 (1996) (noting that "[n]o provision, we concede, short of an absolute ban, can offer certain protection against assault by a determined child," and affirming that the Court has "not, however, generally allowed this fact alone to justify reduc[ing] the adult population . . . to . . . only what is fit for children.") (internal quotations omitted); *id.* at 2416-17 (Kennedy & Ginsburg, J.J., concurring in part and dissenting in part) (same).

For this reason, the government's entire case hinges on the availability of the Act's defenses. But as the district court unanimously concluded, based on its extensive findings of fact, *which the government has not contested*, the defenses simply are not available to the vast majority of online speakers. As a result, the Act does effect a ban on constitutionally protected speech between adults. The government's arguments to the contrary are based on factual assertions that find no support in the record.

a. First, the government argues that the Act's credit card and adult ID defense is available to the small subset of online speakers who charge for access to their Web sites—so-called "commercial" providers. J.S. 22. The government introduced limited evidence that certain commercial "pornographers" already use credit cards or adult ID verification systems. But, as Judge Dalzell explained, these providers will be largely unaffected by the Act precisely because they already require credit cards to obtain access to virtually all of their posted content. Even if the Act were struck down, commercial pornographers would continue to require credit cards, as they did before the CDA was enacted, because they do not want to provide their speech for free. To the extent they offer advertising "teasers" free of charge, the Act would require them to charge for those images as well, but the Act's vast burden on protected speech cannot be upheld based on this minuscule subset of applications in which the credit card defense could arguably be invoked. *See* J.S. App. 135a

(Dalzell, J.). Far from advancing the government's interest "in a direct and material way," *Turner*, 114 S.Ct. at 2470, such narrow application "provides only the most limited incremental support for the interest asserted." *Bolger*, 463 U.S. at 73.[16]

The government's suggestion that the district court should have rewritten Section 223(d)(1)(B) so that it would apply only to these "commercial pornographers," *see* J.S. 26, contradicts the statutory text and clearly expressed congressional intent. As Judge Sloviter concluded below, "[i]t is clear from the face of the CDA and from its legislative history that Congress did not intend to limit its application to commercial purveyors of pornography." J.S. App. 75a. *Accord Shea*, 930 F. Supp. at 949-50. Unlike the dial-a-porn restrictions upon which the CDA is purportedly modeled, the CDA is *not* by its terms limited to "commercial" speakers. And the Conference Report confirms that Congress intended "content regulation of both commercial and non-commercial providers." H.R. Conf. Rep. No. 458 at 191 (1996). Indeed, the Act is expressly made applicable to "libraries and educational institutions." 47 U.S.C. § 230(e)(2). And Senator Exon, the main sponsor of the Act, referred to newsgroups (which contain primarily non-commercial speech) as the principal target of the legislation. *See* 141 Cong. Rec. S8089 (daily ed. June 9, 1995). The district court thus correctly declined to perform the "radical surgery" on the CDA the government suggests.

Further, the government ignores the district court's factual finding that the credit card defense "would impose

[16] If, as the government has suggested, the CDA was principally aimed at commercial providers of online "pornography," Congress could have passed a statute aimed specifically at that activity. *Cf. Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 645-46 (1985) (government may not enact a broad prophylactic rule "simply to spare itself the trouble" of distinguishing speech that is the subject of legitimate regulatory concern from speech that is not).

a significant economic cost on non-commercial entities." J.S. App. 54a. Forcing speakers to require credit card verification before providing access to their speech would cause many speakers, including many appellees, to "shut down" their Web sites. *Id.* Credit card verification, the court found, also "would significantly delay the retrieval of information on the Internet," which, as the government's expert acknowledged, would deter many listeners from seeking access at all. *Id.* And it "would completely bar adults who do not have a credit card and lack the resources to obtain one from accessing any blocked material." *Id.* Based on the evidence, the court concluded that "[a]t this time, credit card verification is effectively unavailable to a substantial number of Internet content providers as a potential defense to the CDA." *Id. The government has not challenged these critical findings.*

b. Ignoring the district court's express findings to the contrary, the government contends that non-commercial Web sites can take advantage of the Act's defenses, and complains that the court did not adequately discuss the availability of "adult verification services," such as "AdultCheck." J.S. 23. The reason is simple. The government offered "very limited evidence" regarding age verification systems, and even that limited evidence "was not based on personal knowledge." J.S. App. 55a. There was no evidence as to how many persons are registered with such systems, or how reliable they are in screening by age. *Id.* There *was* evidence, however, that adult verification systems are used, to the extent they are used at all, only "for accessing commercial pornographic sites [which] charge users for their services." *Id.* Appellees and their potential listeners obviously would not want to be associated with verification systems that are used primarily, if not exclusively, to access "pornographic" sites. *See Denver Area*, 116 S.Ct. at 2391 ("written notice" requirement will restrict cable viewing by subscribers who "fear for their reputations" if it were disclosed they view "patently offensive" material). There are no such verifi-

cation systems for the vast majority of speech on the Internet, including the speech of the appellees in these consolidated cases. The government's contention now that such systems may be available as a defense for commercial speakers who are not "pornographers," and for the huge number of non-commercial speakers, is thus entirely unsupported by the record.

To the contrary, the district court found as fact that "[i]t would not be feasible for many non-commercial organizations to design their own adult access code screening systems because the administrative burden of creating and maintaining a screening system and the ongoing costs involved is beyond their reach." J.S. App. 55a. Indeed, even some "commercial" entities could not afford to do so. *Id.* Moreover, there was evidence that some Web users would not retrieve information requiring credit cards or adult IDs. *Id.* Most importantly, as the court found, "the [g]overnment presented no testimony as to how such systems could ensure that the user of the password or credit card is in fact over 18." *Id.* at 56a. The government has not directly challenged, and has certainly offered no basis for overturning, the district court's factual finding that "[t]he burdens imposed by credit card verification and adult password verification systems make them effectively unavailable to a substantial number of Internet content providers." *Id.*

c. Finally, with not a single citation to the record or to the district court's findings, the government baldly contends that mail exploder, chat room and newsgroup users who want to disseminate patently offensive material to adults can comply with the Act. J.S. 23-25. This contention is fatally undermined by the district court's factual findings. The court concluded, based on the record evidence, that "[t]here is no effective way to determine the identity or the age of a user who is accessing material through e-mail, mail exploders, newsgroups or chat rooms." J.S. App. 49a. Indeed, as the district court

noted, *the government's own expert agreed with those findings. Id.* at 50a.

Despite its current speculation, in the district court "[t]he government offered *no* evidence that there is a reliable way to ensure that recipients and participants in such fora can be screened for age." *Id.* (emphasis added). It is thus not surprising that the government ultimately concedes that users of mail exploders, newsgroups, and chat rooms who want to disseminate their constitutionally protected speech will be forced by the CDA to "switch to an alternative method of communicating that material, over the Internet or otherwise." J.S. 24. But requiring speakers to switch to an alternative method is patently unconstitutional, particularly since there is no realistic alternative, in terms of cost or audience reach, to communication over the Internet. The government can no more single out a mode of Internet communication for special bans (or burdens) than it can single out one mode of the press. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231-32 (1987). And, in any event, the fact that speech can occur elsewhere cannot justify a content-based restriction. *Southeastern Promotions v. Conrad*, 420 U.S. 546, 556 (1975); *Schneider v. State*, 308 U.S. 147, 163 (1939).

Even more offensive to the First Amendment, the government suggests that "users of all three forms of communication always have the option to tone down their communication so that it does not contain material" criminalized by the Act. J.S. 24. In other words, they can self-censor their speech in order to avoid federal prosecution. There could be no clearer admission that the CDA's "display" provision imposes a ban on the dissemination of constitutionally protected speech.

2. *All Three Challenged Provisions Fail Strict Scrutiny Because They Do Not Directly and Substantially Advance Any Compelling Government Interest.*

In any event, even if the majority of Internet speakers *could* utilize the CDA's defenses, and they cannot, the Act would still fail strict scrutiny for the independent reason—not addressed by the government here—that because of the global nature of the Internet, the Act cannot and will not directly and substantially further the government's stated interest. The district court found as fact that "[a] large percentage, perhaps 40% or more, of content on the Internet originates outside the United States." J.S. App. 59a; *accord Shea*, 930 F. Supp. at 931. The government conceded below that some of the speech posted abroad would violate the CDA, J.S. App. 59a, and it is likely that at least 40% of all speech criminalized by the Act originates outside the United States.[17]

Moreover, the subset of indecent and patently offensive speech the government found most troubling (and asserted is the focus of the CDA)—namely, sexually oriented visual images—is generic and largely fungible. Its country of origin is irrelevant. From the perspective of its potential interest to and/or effect on minors, a photo of a nude woman posted in Denmark is no different from a photo of a nude woman posted in the United States. And both are equally available to every American home connected to the Internet. As the district court concluded, "[p]ornography from, say, Amsterdam will be no less appealing to a child on the Internet than pornography from New York City." J.S. App. 145a (Dalzell, J.). Because foreign speakers will have little or no incentive to comply with the Act, "the CDA will almost certainly fail to accomplish the Government's interest in shielding chil-

[17] There was no evidence that the amount of indecent and patently offensive speech, as a percentage of the whole, varies depending on its country of origin.

dren from pornography on the Internet." *Id. See also Shea*, 930 F. Supp. at 941 (concluding that the CDA "will not reach a significant percentage of the sexually explicit material currently available").[18]

In fact, if the Act were upheld, thus criminalizing domestic speech, that would simply "encourage American pornographers to relocate in foreign countries or at least use anonymous remailers from foreign servers." J.S. App. 145a n.22 (Dalzell, J.).

Under strict scrutiny (and even under intermediate scrutiny), the government must demonstrate that the Act "will in fact alleviate the[] harms [it is meant to prevent] in a direct and material way." *Turner*, 114 S.Ct. at 2470. The CDA's inability to regulate foreign speakers precludes any such showing. *See, e.g., Denver Area*, 116 S.Ct. at 2416 ("Partial service of a compelling interest is not narrow tailoring.") (Kennedy & Ginsburg, J.J., concurring in part and dissenting in part); *Florida Star v. B.J.F.*, 491 U.S. 524, 540-41 (1989) (holding that Florida law prohibiting disclosure of rape victims' names in "any instrument of mass communication" but not by other means did not directly and substantially further the law's stated purpose); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 104-05 (1979) (invalidating law making it a crime for newspapers, but not electronic media, to publish the names of juvenile offenders); *see also Bolger*, 463 U.S. at 73 (restriction that "provides only the most limited incremental support for the interest asserted" cannot pass muster under commercial speech standards). As Justice Scalia explained in *Florida Star*, "a law cannot be regarded as . . . justifying a restriction upon truthful speech,

[18] For the same reason, the CDA will not directly and substantially further the government's newly found interest in expanding access to the Internet. Because foreign "patently offensive" and "indecent" online material will remain available to their children, parents (under the government's theory) will continue to be deterred from permitting their children to use the Internet.

when it leaves appreciable damage to th[e government's] supposedly vital interest unprohibited." 491 U.S. at 541-42 (Scalia, J., concurring).

This fundamental shortcoming of the Act exists regardless of whether the online communication is specifically and intentionally directed to minors or is simply displayed in a manner available to them; in either event, the CDA will not shield minors from foreign-originating material. The Act's ineffectiveness is therefore a separate and independent reason for affirming the district court's preliminary injunction as to all three of the CDA's substantive restrictions, regardless of how broadly or narrowly they are construed. *See* pp. 24-26, *infra*.

3. *The Act Fails Strict Scrutiny Because There Are Less Restrictive Means to Achieve the Government's Stated Goals.*

Underlying the government's argument is a single premise—that without the Act, minors would be left "wholly unprotected." J.S. 27. *See also id.* at 24 (arguing that there is "no other effective way to vindicate the government's compelling interests"). But that premise is simply not true. Indeed, it is completely undermined by the district court's findings of fact, based largely on government stipulations.

The district court concluded that "market forces exist to limit the availability of material on-line that parents consider inappropriate for their children." J.S. App. 32a n.12. The district court made extensive factual findings regarding the availability of "software that is intended to enable parents and other adults to limit the Internet access of children." *Id.* at 35a. The court noted that "[t]he market for this type of software is growing, and there is increasing competition among software providers to provide products." *Id.* The court went on to make specific findings regarding two such products: Cyber Patrol and SurfWatch. *Id.* at 35a-41a. The court also found

that all of the major commercial Internet access providers —America Online (AOL), Microsoft Network, CompuServe and Prodigy—"offer parental control options free of charge to their members," and made specific findings regarding those parental control mechanisms. *Id.* at 41a-42a. Each of these findings was based on facts *stipulated* by the government.

The court also discussed PICS (the "Platform for Internet Content Selection"), which has developed "technical standards that would support parents' ability to filter and screen material that their children see on the Web." *Id.* at 33a. PICS provides the ability for third parties, as well as individual content providers, to rate material. Parents can then screen their children's Internet access based on the rating system they choose. Indeed, they can screen out *all* speech that has not been affirmatively identified as appropriate for children by a rating bureau the parents trust. *Id.* These findings too were stipulated by the government.

Based on these stipulated facts and the additional evidence it heard at trial, the court concluded that "currently available user-based software suggests that a reasonably effective method by which parents can prevent their children from accessing sexually explicit and other material which parents may believe is inappropriate for their children will soon be widely available." J.S. App. 42a.

As Judge Dalzell explained, these software tools afford parents options to protect their children from online material they deem inappropriate. J.S. App. 146a. But even without such software, "parents can supervise their children's use of the Internet or deny their children the opportunity to participate in the medium until they reach an appropriate age." *Id.* The government can support parents by educating the public about the "benefits and dangers of this new medium." *Id. See Denver Area*, 116 S.Ct. at 2393 (concluding that "informational requirements" together with support for user based blocking is a more narrowly tailored means of limiting minors' access

to patently offensive material on cable than is speaker based blocking).

In other sections of the CDA, Congress determined that user based blocking mechanisms are the most appropriate means of regulating content, including indecency, on broadcast television. In Section 551 of the Act, Congress directed television manufacturers to equip their products "with a feature designed to enable viewers to block display of all programs with a common rating"—the so-called "V-chip." Sec. 551(c). Congress then encouraged the broadcast industry to develop a rating system, Sec. 551(b), and expressly stated federal policy to encourage the establishment of a "technology fund" to support the development of user-based blocking technology and public education, Sec. 552. The fact that Congress has chosen these significantly less restrictive means to protect minors from indecent material in broadcast television further supports the district court's holding that the Act is not narrowly tailored. *See Denver Area*, 116 S.Ct. at 2392 (unexplained decision to use "significantly less restrictive" means to shield minors from "patently offensive" material on regular cable channels demonstrated that restrictions applicable to leased channels is neither the "least restrictive alternative" nor "narrowly tailored").

C. The Non-Display Provisions of the CDA Preliminarily Enjoined by the District Court May Pose Different Questions If They Are Construed As the Government Now Apparently Construes Them on Appeal.

The government did *not* argue below that Sections 223(a)(1)(B) and 223(d)(1)(A) only criminalize the transmission of "indecent" or "patently offensive material" when the speaker *knows* that the *only* recipient of the communication is under 18 years of age. The government now contends, for the first time, that Section 223(a)(1)(B) "applies *only* in situations in which a person transmits indecent material to another person, knowing *that person* is under 18." J.S. 20 (emphasis added). If we understand the government correctly, it is now interpreting Section 223(a)(1)(B) to apply only when the *only* recipient of a communication is known to be a minor.[19]

Below, all parties assumed that Section 223(a)(1)(B) could, and would, be interpreted to criminalize any indecent communications using a telecommunications device when the speaker, knew, or had reason to believe, that *any* recipient of the communication would be a minor. Since every content provider on the World Wide Web, for example, knows—in the sense of being virtually certain—that some recipient of the message will be a minor, Section 223(a)(1)(B) creates the same constitutional problems (barring speech between adults in order to shield minors from the same speech) as the display provision. Accordingly, it is not surprising that the district court applied the same First Amendment analysis to the non-display provisions, and unanimously concluded that the "[p]laintiffs have established a reasonable probability of eventual success in the litigation by demonstrating that §§ 223(a)(1)(B) and 223(a)(2) of the CDA are unconstitutional on their face to the extent that they reach indecency." J.S. App. 62a. Although the government now asserts that the display provision and the other provisions "require[] separate analysis," J.S. 19, it did *not* urge any separate analysis below. *See* note 12, *supra*. Based on the arguments that *were* made to the district court, its conclusion regarding § 223(a) was clearly correct.

The government also now, for the first time, interprets Section 223(d)(1)(A) as applying only to "situations in which a person sends indecent material to someone he knows to be under 18." J.S. 21. It is not at all clear that this is a tenable interpretation of Section 223(d)(1)(A),

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[19] Of course, even under this interpretation, the provision could still senselessly, and indeed unconstitutionally, outlaw a college professor's communications concerning *Lady Chatterly's Lover* or *Moll Flanders*, for example, to a student known to be under 18.

which, unlike Section 223(a)(1)(B), does not expressly impose a scienter requirement regarding age. If we understand the government correctly, however, it is now interpreting Section 223(d)(1)(A) to apply to a communication with specific persons where the speaker knows that the *only* persons receiving the message are minors.

Below, all parties assumed that Section 223(d)(1)(A) could, and would, be interpreted to reach any "patently offensive" communication knowingly made using an interactive computer service where the speaker sent the message to specific persons—such as by e-mail or mail exploders—as opposed to methods of online communication in which the speaker merely makes his speech available to anyone who wants to access it, such as through the World Wide Web. Under this interpretation, Section 223(d)(1)(A) imposes virtually the same restrictions on adult-to-adult communications as does the display provision, and presents the same constitutional problems. Not surprisingly, the district court unanimously concluded that "Sections 223(d)(1) and 223(d)(2) of the CDA are unconstitutional on their face." J.S. App. 62a. Based on the arguments made to the district court, this conclusion was clearly correct.

In summary, the display provision clearly violates the First Amendment because it bans "patently offensive" but constitutionally protected speech between adults. As understood and argued below, the other provisions suffer from the same infirmity. If the government is now definitively and officially construing those other provisions to apply only when the speaker knows that the *only* recipients of the speech are minors, this Court should not itself undertake to review, *ab initio*, the constitutionality of these newly coined provisions. Instead, it should allow the district court to reassess those provisions on remand in light of the government's new position.

CONCLUSION

Although the judgment below was plainly correct, and would warrant summary affirmance, because this is a case of first impression involving application of First Amendment principles to an important new medium of communication, appellees do not oppose the government's request for plenary review.

Respectfully submitted,

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